NO. 45648-6-II

THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY,

BEVERLY A. GORDON
Appellant
v.

KITSAP COUNTY, KITSAP COUNTY CHIEF OF CORRECTIONS NED NEWLIN, JOHN AND JANE DOES 1-20, BRAXTON NEAL, and JANE DOE NEAL, and the marital community comprised thereof,
Respondents,

APPELLANT'S REPLY BRIEF (Title Amended)

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1. *Defendants' Brief Fails to Recite Facts and Reasonable Inferences in the Light Most Favorable to the Nonmoving Party*

Defendants assert that plaintiff was present the day before she was injured when an Officer Frank Davenport briefed medical staff on security matters related to conducting a blood draw. (Brief of Defendants, page 6). In conducting its inquiry, the court must view all facts and reasonable inferences in the light most favorable to the nonmoving party *City of Lakewood v. Pierce County*, 144 Wash.2d 118, 125, 30 P.3d 446 (2001).

Defendants' statement of the case fails to consider facts and reasonable inferences in the light most favorable to the nonmoving party, which is appropriate for review of the trial court's failure to grant plaintiff's motion for partial summary judgment, but inappropriate for review of the trial court's dismissal of plaintiff's case.

In direct contradiction to defendants' assertions, the declaration of Beverly Gordon presented to the trial court declares that Officer Davenport never instructed her on safety procedures when drawing blood, that Officer Davenport did not tell plaintiff where to stand or not to lean over a table or what to do if things went wrong. Furthermore plaintiff testified in her declaration that Officer Davenport never instructed anyone

within her hearing on safety issues related to drawing blood from Braxton Neal.[1]

2. *Defendants Failed to Raise the Affirmative Defense of Fault of a Nonparty in the Court below*

The defendants' brief at page 5 asserts that Conmed is an independent contractor with complete control over medical services, thereby implying that defendants have no responsibility for safety of medical and clinical staff. However, defendants' reply to plaintiff's complaint failed to raise nonparty negligence as an affirmative defense, and the allegation that Conmed was responsible for the safety of plaintiff should not be considered on appeal. CR 8(c) requires the affirmative defense of fault of a nonparty to be affirmatively pled. Defendants failed to do so.

Furthermore, the declaration of Beverly Gordon specifically stated that at all times when she was working for Conmed in the Kitsap County jail; she relied upon corrections officers to provide for her personal safety and security.[2]

Additionally, the testimony of Frank Davenport acknowledged that plaintiff was in charge of medical and Officer Davenport was in charge of

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[1] CP 364,365.
[2] Id.

security. Officer Davenport further acknowledged that he makes the security decisions and plaintiff makes the medical decisions.[3]

3. *Risk of Assault Is Not within the Scope of Harm Contemplated by a Nurse's Standard of Care When Attempting a Blood Draw*

Defendants assert that plaintiff violated the medical standard of care for drawing blood by allowing Braxton Neal to stand as she drew blood. What defendants have overlooked is plaintiff's declaration explaining that the medical standard of care for drawing blood is based upon safety of the patient in the event the patient passes out.[4] Beverly Gordon has never been taught that she should have a patient sit in order to protect herself from possible assault.

The Restatement (Second) of Torts § 468 (1965) provides:

> **§ 468. Harm Not Resulting from the Hazard Which Makes Plaintiff's Conduct Negligent**
>
> The fact that the plaintiff has failed to exercise reasonable care for his own safety does not bar his recovery unless harm results from one of the hazards which make his conduct negligent.

As an example, the Restatement explains that one whose negligent conduct in crossing a street without looking out for vehicles has subjected

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[3] CP 82.

[4] CP 341, 342

him to the risk of being run down by a car, is not barred from recovery where, as a result of that conduct, he is unforeseeably injured by an explosion of dynamite carried in a truck which collides with an automobile.

Because the risk of being assaulted is not contemplated by a nurse's standard of care as a foreseeable harm from allowing a patient to stand while drawing blood, Beverly Gordon's negligence does not constitute contributory negligence under the facts presented by this case.

4. *Defendants mistakenly assert lack of authority for applying The Restatement (Second) of Torts § 319 (1965) to a correctional facility*

Defendants correctly point out that The Restatement (Second) of Torts § 319 (1965) has never been applied by Washington courts to impose a duty on a correctional facility. What the defendants fail to mention, is that other jurisdictions have imposed a duty on correctional facilities under § 319. See, *Cansler v. State*, 675 P.2d 57, 234 Kan. 554 (Kan. 1984).

In *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), the Washington State Supreme Court cited with approval the decision in *State v. Silva*, 86 Nev. 911, 478 P.2d 591 (1970), where an inmate at a state "honor camp" escaped and committed a rape. The Nevada Supreme Court

held that the state was not immune from a suit alleging negligence in the control and supervision by the facility, and recognized the state's duty to supervise and control the inmates in a non-negligent manner.[5]

5. *Defendants Reliance on Craig v. Washington Trust Bank as Authority for Asserting Lack of a "Special Relationship" Is Misplaced*

Defendants have incorrectly cited *Craig v. Washington Trust Bank*, 94 Wn.App. 820, 976 P.2d 126 (1999), for the proposition that "employers have no special relationship with employees of independent contractors, and thus have no duty to protect such employees."[6] The *Craig* case was a lawsuit brought by a janitor who was assaulted outside her place of employment while taking out the garbage one night. No employee had ever reported being attacked outside of the workplace. Defendants failed to explain the rationale of the court:

> The regulations cited by Ms. Craig generally require safe workplaces and operational practices "free from recognized hazards." WAC 296-24-073(1), (3). Here, Ms. Craig was a janitor. She was not required to perform inherently dangerous duties. She was injured while taking the garbage out, neither the task itself nor the area where the dumpster was located was inherently

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[5] The decision of the Nevada Supreme Court was based on issues of sovereign immunity, not on The Restatement (Second) of Torts § 319 (1965).

[6] Brief of Defendants page 21

> dangerous. Adopting Ms. Craig's argument would place a burden on employers and owners not contemplated by the regulations she cites. Accordingly, we conclude the trial court did not err.

Craig v. Washington Trust Bank, 94 Wn.App. at 129.

In contrast to the situation in *Craig,* Beverly Gordon was working in a workplace which was inherently dangerous. She was required to perform duties which were inherently hazardous duties, recognized as such by the defendants in this case. Furthermore, Conmed, the direct employer of Beverly Gordon had no authority to dictate security procedures to the Kitsap County jail.

6. *The Standard of Care Owed by Defendants to Plaintiff Is an Issue of Law, and Expert Testimony Is Not Required to Establish the Standard of Care.*

Defendants contend that plaintiff did not identify the standard by which conduct of the jailers should be measured. The very case cited for defendant's proposition, however, states as follows:

> Finally, **the City maintains that plaintiff failed to identify any standard of conduct** applicable to Hoover. However, ***Taggart* identifies the standard of care as that set forth in § 319 of the Restatement (Second) of Torts.**
>
> We conclude that *Taggart* controls this case, and that the City and its probation counselors have a duty to control municipal court probationers to protect others from reasonably foreseeable harm resulting from the probationers' dangerous propensities. (Emphasis added.)

Hertog, ex rel. S.A.H. v. City of Seattle, 979 P.2d 400 at 409 (Wash. 1999) .

The standard of care to be used in a negligence case is a question of law. *Edgar v. Brandvold*, 9 Wn.App.899, 515 P.2d 991 (1973). As to whether expert testimony is required to factually prove violation of the duty, the *Edgar* court cited 2 B. Jones, Evidence § 14.9 (S. Gard 6th ed. 1972) as follows:

> The rule is that in the discretion of the court expert testimony may be excluded if all primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding are as capable of comprehending the primary facts and of drawing correct conclusions from them as are the witnesses possessed of special or peculiar training, experience, or observation.
>
> The decisive consideration in determining whether expert opinion evidence is necessary is whether the subject of inquiry is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact, or on the other hand, is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.

Edgar v. Brandvold, 9 Wn.App.899 at 904, 515 P.2d 991 (1973).

Defendants have raised a cloud of obscurity to convince the court that some special standard of care applies to the Kitsap County correctional facility. Specifically, the defendants argue that "Ms. Gordon

must articulate the degree of care, skill, and diligence required of a reasonable correctional facility in dealing with inmates similar to Neal."

Defendants have not provided any authority from Washington courts or from any other jurisdiction adopting the standard of care advocated by defendants. Instead, defendants indicate that standards of care may be guided by internal directives or policies, or by statutory provisions. None of those contentions has anything to do with the factual situation that was before the trial court in this case.

Defendants further argue that "the standard of conduct of reasonable correction officers is a highly technical field that is far beyond the realm of the average juror." Defendants recite a veritable cornucopia of statutory schemes, administrative regulations, policies and local codes, asserting that knowledge of all of these legalities surrounding the operation of a correctional facility is knowledge that a jury must have in order to decide whether Kitsap County failed to protect Beverly Gordon from assault by a dangerous inmate. Again, there are no cases to support this bold proposition. The standard of care is a matter of law to be given to the jury by the court. *Edgar v. Brandvold*, 9 Wn.App.899 at 904, 515 P.2d 991 (1973).

Defendants bolster their argument by asserting that Kitsap County must be careful under the eighth amendment to the Constitution not to impose cruel and unusual punishment on inmates.

All of defendants' arguments fail. Beverly Gordon does not assert that Kitsap County should violate the constitutional rights of inmates. There is no authority to support the proposition that protecting employees of Kitsap County is a violation of anybody's constitutional rights. No one asserts that Kitsap County's duties under the administrative regulations policies and local codes prevent Kitsap County from protecting nurses from violent inmates.

In short, defendants' argument seems to be based upon a regrettable disdain for the intelligence of the average juror to figure out whether Braxton Neal could have been restrained in some fashion so that Beverly Gordon would not be assaulted.

Other jurisdictions dealing with standards of police conduct have not required expert testimony. *Coll v. Johnson*, 161 Vt. 163, 636 A.2d 336 (Vt. 1993) was a case based on excessive force by police officers. Expert testimony was not required for a jury to decide if excessive force was in fact used. As stated by the court:

> Simply put, an arrest is not heart surgery. Once it is established that the force exerted by police caused the harm to a given plaintiff, the determination for the jury

> is whether that force was reasonable under the circumstances. This determination does not involve the "scientific, technical, or other specialized knowledge" contemplated by Rule 702.

Coll v. Johnson, 161 Vt. 163, 166, 636 A.2d 336, 339.

Similarly, in the case now before the court, what Kitsap County needs to do to protect Beverly Gordon from an inmate with a violent history and who is suffering from paranoid schizophrenia, is not heart surgery and does not involve scientific, technical or other specialized knowledge. Handcuffs are something that most jurors understand. Having enough officers present to restrain a violent inmate is not technical. The question is a jury question and not the proper subject of expert testimony.

IV. CONCLUSION

Petitioner requests that the appellate court reverse the trial court's dismissal of Beverly Gordon's lawsuit against Kitsap County and Kitsap County Chief of Corrections Ned Newlin and remand for trial.

Signed this 7 day of July 2014.

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DECLARATION OF SERVICE

(Pierce County Superior Court No. 12-2-05495-4)

I, Julie duChene, certify that I caused a copy of the following:

Appellant's Opening Brief.

to be served on all parties or their counsel of record on the date below:

Via email:
Ione S. George, igeorge@co.kitsap.wa.us Kitsap County Prosecuting Attorney Civil Division 614 Division St. MS-35A Port Orchard, WA 98366

I certify under penalty of perjury under the laws of Washington State that the foregoing is true and correct.

Dated this 7th day of July 2014.

BECKER ROVANG, PLLC

Julie duChene

Julie duChene, Paralegal

ORIGINAL

NO. 45648-6-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

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BECKER ROVANG, PLLC

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Julie duChene, Paralegal